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IN THE

Supreme Court of the United States

No. 277 October Term, 1947

ARNOLD BERNSTEIN, also known as
ARNOLD M. BERNSTEIN,

Petitioner,

against

VAN HEYGHEN FRERES SOCIETE ANONYME,

Respondent.

PETITION OF ARNOLD BERNSTEIN, ALSO KNOWN AS ARNOLD M. BERNSTEIN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM S. BENNET
VICTOR HOUSE
44 Wall Street
New York 5, N. Y.
Attorneys for Petitioner.

EARL G. HARRISON
SIDNEY M. DAVIS
of Counsel.

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PETITION OF ARNOLD BERNSTEIN, ALSO KNOWN AS ARNOLD M. BERNSTEIN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Arnold Bernstein, also known as Arnold M. Bernstein, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit, affirming an order of the United States District Court for the Southern District of New York vacating a warrant of attachment of defendant's property and dismissing the complaint herein.

Opinions Below

The opinion of the Circuit Court of Appeals, dated July 10, 1947, appears at R. 61* and is reported at—Fed. (2d) ———. The opinion of the District Court appears at R. 50 and is reported at ———F. Supp. ———.

Statement of Matter Involved

The plaintiff, petitioner herein, formerly a German national and now an American citizen, owned shipping interests in Germany (R. 11, 18, 19). He returned to Germany in 1937 and was arrested on trumped-up charges of violating German foreign exchange regulations (R. 12, 19). Under duress by "Nazi officials and others" the plaintiff, while still in prison, transferred control of his shipping interests to one Marius Boeger, a German private citizen (R. 12, 19). Boeger in turn caused to be transferred to the defendant, respondent herein, a vessel included among such interests, for an inadequate consideration (R. 12, 19-20, 24-26). The defendant, a Belgian business concern, had knowledge or full notice of the circumstances of duress under which the plaintiff had transferred control of the vessel (R. 13, 20).

The petitioner brought this action in the New York Supreme Court for recovery of the loss occasioned by the conversion of the vessel, aggregating approximately $900,000. The complaint contained four counts, for conversion and for money had and received (R. 18-23). The

* All record references are to pages of the record.

action was commenced by petitioner's obtaining a warrant of attachment on the insurance proceeds of the vessel, which had meanwhile been sunk (R. 47-49).

At the defendant's instance, the action was removed to the United States District Court for the Southern District of New York on the ground of diversity of citizenship (R. 8). Before joinder of issue, the defendant moved in the District Court to vacate the warrant of attachment (R. 5-6). The District Court granted an order vacating the warrant of attachment and also dismissing the complaint (R. 54-56). The Circuit Court of Appeals, one judge dissenting, affirmed the order of the District Court (R. 61-77).

The complaint (par. 6) alleged *inter alia* that the plaintiff had been coerced by "Nazi officials and others" into divesting himself of his shipping interests (R. 19). On a motion to vacate the attachment the District Court construed the phrase "Nazi officials" to mean *agents of the German government acting within the scope of their delegated powers,* and held that since a court of this forum cannot inquire into the acts of a foreign government committed within its jurisdiction, the court was powerless to afford a remedy (R. 53). The majority opinion of the Circuit Court, affirming the District Court, stated that the primary question on appeal was "whether the determination of the validity of acts of the German Government in 1937 is within the jurisdiction of a court of the State of New York" (R. 63), and again invoked the "non-inquiry" rule as to foreign "acts of state" to bar the action (R. 65,

72). The Circuit Court further construed pertinent expressions of the Executive branch of our government as insufficient to permit judicial inquiry into acts of the Nazi regime in Germany (R. 69).

The minority opinion took the position that at the present stage of the proceedings "enough has been shown—or is within our judicial ken—to justify allowing the plaintiff a trial rather than dismissing his case finally on this preliminary motion" (R. 73). The dissenting judge interpreted the cited actions of the Executive as repudiating the Nazi regime and freeing our courts from the restraint of the "act of state" doctrine* (R. 76). He reached the conclusion that in any event a trial should be ordered so that official definition of Executive policy could be procured and a full inquiry made dealing "with actualities at the time" (R. 73, 74, 75).

It is clear that the courts below found as a fact, on the bare pleadings (only petitioner's complaint and affidavit in support of the attachment), and with no opportunity afforded to present evidence, that the phrase "Nazi officials" in the complaint necessarily referred to *German governmental agents, acting pursuant to their governmental authority and for a governmental purpose.* The petitioner seeks an opportunity to prove that the duress exerted by these "Nazi officials" was personal and for private ends, and *not* governmental—and that therefore the "act of

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* The theory that under certain conditions courts of the forum will not inquire into the acts of a foreign state committed within its territory is for brevity hereafter variously referred to as the "non-inquiry" rule or doctrine, the "act of state" doctrine, the doctrine of "judicial abstention", or simply as the "doctrine".

state'' doctrine does not operate to restrain inquiry in this case. Furthermore, it is the petitioner's contention that in any event the ''act of state'' doctrine ought not to be invoked here since (1) the conditions prescribed by this Court prerequisite to the application of the doctrine are not present here, and (2) there is a clear expression of policy by the Executive branch of the government which renders its application here inconsistent and erroneous.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Section 347 (a)).

Questions Presented

1. May an American court having jurisdiction close its doors to one now an American citizen who, while a resident of New York and in Germany on business, was a victim of an act of extortion, on the theory that it is powerless to proceed because ''Nazi officials'' allegedly participated in the extortion?

2. Was not the petitioner improperly deprived of his right to a fair trial by (a) the rulings of the courts below, on preliminary motion before answer, that an allegation of coercion by ''Nazi officials and others'' inducing the petitioner to surrender his property, necessarily and conclusively meant coercion by German governmental authorities *acting officially*, and (b) the consequent dismissal of the complaint on the basis of the ''act of state'' doctrine,

without affording the petitioner an opportunity to prove that, in fact, the "Nazi officials" were acting in a private capacity and in their own interests, so that such doctrine was not applicable?

3. Did not the District Court err in making findings of fact, *i.e.*, that the acts of duress in question were "acts of state", on the bare allegations of plaintiff's pleadings, precluding the introduction of proof to the contrary, where the words "Nazi officials" in the allegations were susceptible of different meanings?

4. Did not the lower court err, on preliminary motion before answer, in vacating the petitioner's attachment and dismissing his complaint on a finding by the court that an "act of state" was involved, thus precluding petitioner from the opportunity of establishing that the "Nazi officials" mentioned did not in fact act nor purport to act as governmental agents, that the transferee of the petitioner's property was a private citizen, and that no foreign sovereign interest was involved in the transaction by which the petitioner parted with his property, and was not the petitioner thereby deprived of due process of law?

5. Did not the lower courts err in invoking the "non-inquiry" doctrine in the instant case, inasmuch as the conditions for its application did not obtain here, *i.e.*, that the foreign sovereign be a *friendly, existing sovereign;* that the acts involved *lack malice or personal or private motive;* that judicial scrutiny of such foreign "acts of state" would *"imperil the amicable relations between governments and vex the peace of nations"*?

6. Assuming *arguendo* that the alleged "Nazi officials and others" were government agents, acting within the scope of their delegated powers, and for governmental purposes, was it not error for the lower courts to invoke the "non-inquiry" doctrine in the light of the American Executive's clearly expressed policy of restoration to those minorities despoiled by the Nazis, thereby relieving American courts of the restraint of the said doctrine?

7. Did not the lower courts err in failing, at this preliminary stage, to construe the complaint in the light most favorable to the plaintiff?

8. Did not the lower courts err in dismissing the complaint on a motion seeking only to vacate the warrant of attachment?

Specifications of Errors to Be Urged

The court below erred in that:

1. It vacated the attachment herein and dismissed the complaint on preliminary motion, before answer, without affording the petitioner the opportunity to which he was legally entitled to establish by proof clearly admissible under his pleadings that the German government under the Nazi regime was in fact not a participant in the transactions that are the basis of his claim.

2. It disregarded the applicable Federal and New York State law entitling a plaintiff, on a motion to vacate an attachment, to every favorable interpretation of his pleadings and to have them sustained unless it appears to a cer-

tainty that he would not be entitled to relief under any set of facts provable under his allegations.

3. It erroneously concluded that the petitioner's use of the phrase "Nazi officials" precluded the possibility of proof that the "officials" in question neither acted nor purported to act, in the transactions complained of, in governmental capacities, and that the phrase was used merely *descriptio personis*.

4. It erroneously interpreted the doctrine of non-inquiry into the transactions of a foreign sovereign within its own boundaries enunciated by this Court in *Underhill* v. *Hernandez*, 168 U. S. 250 and *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, to be applicable to the facts here, without requiring proof to establish facts prerequisite to its applicability, without inquiry of the American Executive, and contrary to the policy expressed in and inferable from acts and declarations of the American Executive relieving American courts of the restraint thereof upon the exercise of their jurisdiction herein.

5. It disregarded the limitations upon the said doctrine enunciated in the above and other decisions, *e.g.*, *Republic of Mexico* v. *Hoffman*, 324 U. S. 30; *Ricaud* v. *American Metal Co.*, 246 U. S. 304.

6. Contrary to official declarations indicating restoration of property despoiled under the Nazi regime to be the keystone of American Executive policy, it erroneously held the petitioner's claim to be "reserved for adjudication along with all other such claims as part of the final settlement with Germany" (R. 72).

7. It disregarded controlling rulings that American courts should proceed with the enforcement of the regular judicial processes unless constrained by established executive or legislative policy calling for judicial abstention, and in the absence of an explicit assertion of such policy and disregarding acts and declarations of the American executive negativing it, declined to direct the exercise of jurisdiction herein.

8. It held on preliminary motion, erroneously and prematurely, that for the petitioner to recover in this action, inquiry into the sovereign acts of a foreign government was necessary.

9. Having assumed that "if the plaintiff had been despoiled by a private person in Germany in the way he was in fact despoiled, a New York court would not feel bound to concede the validity of the transfer, even though under the law of Germany it was valid" (R. 71), it refused erroneously to reverse the decision and order of the District Court and to return the case to that court for the ascertainment upon a trial whether plaintiff was in fact despoiled by a private person or persons or by some government in Germany.

10. It affirmed the order of the District Court dismissing the complaint and denying the petitioner his right to a trial on the facts, despite the lack of power in the District Court to make such order, there being no motion properly before the Court for such relief.

Reasons Relied on for Allowance of Writ

1. The lower courts have erroneously decided an important and novel question, *i. e.*, whether the "act of state" doctrine may be invoked in relation to a defeated enemy, the Third German Reich. The decisions below conflict with the principles governing the "act of state" doctrine, as enunciated by this Court. In any event, the Executive has acted to relieve the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine.

A. *The decisions below conflict with the principles governing the application of the "act of state" doctrine, as enunciated by this Court.*

The question whether or not the "act of state" non-inquiry rule should apply as to acts of the Nazi regime is an important question, and one of first impression. It was recognized as such in the dissenting opinion in the court below (R. 73).

The doctrine is premised upon the condition that the foreign nation to which we accord such judicial respect be one to which our Executive accords recognition as a *de facto* or *de jure* government. Cf. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Banco de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438 (C. C. A. (2d)). But, as the dissenting judge below observed,

> "those precedents do not deal with, or even appear to visualize, the situation where our Executive acts later to repudiate the recognition which it has granted and to declare the acts of that nation as wrongful and void, to be wiped out by a tremendous war effort and by acts of restitution and retribution at the war's end. Many things have happened since

> the days when Nazi Germany was the recognized government of German territory—so many and so important that *we have no precedent to govern this case. In short, a new one must be formulated.*" (Italics added) (R. 73)

The majority opinion, by implication at least, seems likewise to have recognized the novel character of this issue, for that opinion frankly states the view that an interpretation of the doctrine making it applicable to the instant case

> "was a necessary corollary of decisions of the Supreme Court, *and if we have been mistaken, the Supreme Court must correct it.*" (Italics added) (R. 65),

citing by footnote, but without allusion to the conditions and limitations implicit or expressly recognized therein, *Underhill* v. *Hernandez,* 168 U. S. 250, and *Oetjen* v. *Central Leather Co., supra.*

It is well settled that the validity of the official acts of a friendly foreign government within its territory may normally not be litigated in the courts of this forum. *Union Shipping & Trading Co.* v. *United States,* 127 F. (2d) 771, 774, (C. C. A. 2d); *The Claveresk,* 264 F. 276 (C. C. A. 2d, 1920); *Hewitt* v. *Speyer,* 250 F. 367 (C. C. A. 2d, 1918). Cf. *Princess Paley Olga* v. *Weisz,* (1929) 1 K. B. 718. This doctrine is conditioned, however, upon the existence of a friendly recognized foreign sovereign to which claimants may look for adequate redress of asserted wrongs, a sovereign whose official transactions are entitled, at the time of decision, to be respected in our courts. The doctrine is rooted in the theory that the prerogatives of the Execu-

tive in foreign relations must not be interfered with, lest amicable relations between nations be adversely affected. *Underhill* v. *Hernandez, supra; Oetjen* v. *Central Leather Co., supra.*

Furthermore, the doctrine is expressly limited by decisions of this Court to cases where the facts warrant a finding that the spoliation complained of had for its purpose "the benefit of the community" or foreign country concerned, and was not actuated "by malice or any personal or private motive".

These conditions precedent to the invocation of this doctrine constituted the rationale of the decisions of this Court in *Underhill* v. *Hernandez, supra,* and *Oetjen* v. *Central Leather Co., supra.* The complete absence of such prerequisite conditions, and the existence here of an entirely different and novel situation, was emphasized in the opinion of the dissenting judge in the court below (R. 72-73).

In the instant case, the record discloses no "benefit to the community" and it may fairly be inferred from the plaintiff's allegations that the transaction here involved "malice" and was actuated by "personal" and "private" motives (R. 19). Inquiry into the acts of the defunct Nazi regime in Germany will not "vex the peace of nations". There is no existing "friendly" foreign government involved, cf. *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 34 (1945), for the Third German Reich has been relegated to the limbo of history. There are no amicable relations existing between our government and the late German Reich. Indeed, the Executive has strikingly repudiated recognition of the Nazi regime and declared as its express policy the

undoing of the wrongs and restoration of property despoiled under it.

Banco de Espana v. *Federal Reserve Bank, supra,* a case in which inquiry into the official acts of a superseded foreign government was denied, is readily distinguishable from the case at bar. The court in its opinion in that case made it clear that its holding applied only in favor of persons dealing *directly with a foreign government.* "Persons *who dealt with the former Spanish government* are entitled to rely upon the finality and legality of that government's acts, at least so far as concerns inquiry by the courts of this country." (at p. 444)

Furthermore in the *Banco de Espana* case the government concerned (the Spanish Loyalist government, later overthrown by civil war) entertained friendly relations with our government, and indeed was at that time directly involved in commercial transactions with the American government. This situation contrasts sharply with the facts of the instant case, for the German government under the Nazi regime has the status of a *defeated enemy.* The *Banco de Espana* case, turning as it does on a change of regime in a continuing friendly state, can hardly be analogized to this case, involving a defeated enemy of our government.

Thus, there is no precedent in this Court for application of the "act of state" doctrine in the unique situation presented by the Third German Reich. The importance, as well as the novel character, of the question thus raised cannot be over-stated. This is one of the primary legal problems to arise out of the recent war, and its ramifications are of wide extent.

The importance of a definitive and final ruling by this Court on this unprecedented and significant question is therefore readily apparent. In invoking the doctrine in the instant case, the courts below resolved for the first time important questions as to the scope and applicability of the doctrine, expanded the doctrine to an extent which conflicts with the limitations previously imposed upon it by this Court (see *Republic of Mexico* v. *Hoffman, supra,* and the *Underhill* and *Oetjen cases, supra*), and disregarded the rationale of the decisions of this Court enunciating the "non-inquiry" rule.

B. *In any event, the Executive has acted to free the courts of the restraint upon the exercise of their jurisdiction imposed by that doctrine.*

The decision of the court below is diametrically opposed to and frustrates the policy of the Executive, and tends "to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish." *United States* v. *Pink,* 315 U. S. 203, 233. It also tends "to enlarge an immunity to an extent which the government * * * has not seen fit to recognize". *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 38.*

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* The *Republic of Mexico* v. *Hoffman* case is peculiarly apposite here. It involved a vessel, which the Republic of Mexico concededly owned, but of which it had not taken possession. The record here (R. 24-26) discloses that the vessel, erroneously characterized below (R. 63) as "confiscated" by the Nazi regime, was at the time of its transfer in June 1939 to the defendant still owned by and in the possession of the plaintiff's own shipping company.

This Court stated in the *Republic of Mexico* case, at p. 36, that

> "recognition by the Courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarassing to it."

The court below denominated as the critical issue in the case the question whether our own government has already acted to relieve the courts of restraint upon the exercise of their jurisdiction (R. 67).

The majority below concedes (R. 65) and the authorities agree that the acts of the Executive in the international political sphere are binding upon our courts. *United States* v. *Pink, supra; The Maret,* 145 F. 2d 431, 440 (C. C. A. 3d, 1944); see *United States ex rel D'Esquiva* v. *Uhl,* 137 F. (2d) 903, 906-907 (C. C. A. 2d, 1943).

Since the decision of the Circuit Court of Appeals, the Executive, with the approval of the State, War and Navy Departments, has issued a new directive (issued July 15, 1947; New York Times, July 16, 1947, p. 8) superseding J. C. S. Directive 1067 (State Department Publication No. 2423, pp. 40-59) referred to in the dissenting opinion below, which definitely enunciates American Executive policy here applicable. The initial paragraph states that:

> "This Directive * * * constitutes a statement of the objectives of your Government in Germany and of the basic policies to which your Government wishes you to give effect from the present time forward."

Paragraph 17, entitled "Restitution", in its subdivision (d) states:

> "It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should either have their property returned or be compensated therefor * * *"

The full text of the two foregoing subdivisions is printed for this Court's convenience in the Appendix of this brief (pp. b, c, *infra*).

The petitioner also referred the court below to a number of Executive expressions of policy (see Appendix, pp. a, b, *infra*), the nature, purpose, bearing and effect of which are to repudiate and to prescribe redress for acts of the Nazi regime in Germany. The dissenting judge was prepared on the basis of the above material to conclude that American executive policy had been disclosed sufficiently for American courts to be bound in circumstances such as exist here to exercise their jurisdiction (R. 74-76).

The majority opinion below failed to heed the impact and general sense of these executive pronouncements. The consistent endeavors of our Executive to institute and implement a program of restoration of despoiled property are a clear indication of the intent of the Executive to relax any restraint attributable to the "act of state" doctrine here.

This Court in *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35, recently stated that

> "It is therefore not for the courts to deny an immunity which our government has seen fit to allow or to allow an immunity on new grounds which the government has not seen fit to recognize".

The concurring opinion in the same case stated (at pp. 41-42) that

> "courts should not disclaim jurisdiction which otherwise belongs to them * * * except when 'the department of the government charged with the conduct of

> our foreign relations', or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes".

The striking contrast between our Executive policy, as it clearly appears from the official expressions referred to above, and a judicial policy of non-inquiry into alleged "acts of state" of the Nazi regime, precisely measures the gross inconsistency of a policy "looking to restitution to the Jews in Germany at the same time that it accepts the acts of Nazi oppression of the Jews as binding in American courts." (Dissenting opinion, R. 76).

The net effect of these executive pronouncements is that looted property* found within Germany or former Axis territory will be restored to its owner, whereas by the decision below jurisdiction to achieve the same result in an American court is abdicated; in other words, within the territory of the former foreign sovereign, its acts or supposed acts get no respect, but in an American court on United States soil they become sacrosanct.

This is in direct conflict with the rationale of the decisions of this Court enunciating the doctrine of judicial abstention, and with the recent express pronouncements of

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* *i.e.*, "property which has been the subject of transfer under duress or wrongful acts of confiscation, dispossession or spoliation, whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise". Cf. Military Government Law No. 52 (procurable from War Department), Art. I, par. 2.

this Court prescribing the regard to be accorded American Executive policy.

Accordingly, the petitioner's contention that the restraint of the "act of state" doctrine had no application should have been sustained. At the very least, if the precise nature of the Executive's policy was in doubt, such disputed issue of fact should properly have been resolved at a trial at which relevant evidence could have been introduced.

2. The petitioner has been denied his right to a fair trial and a day in court as a result of the erroneous rulings below.

Even if the lower court was correct in holding that the "act of state" doctrine applied to acts of the Nazi regime, nevertheless the court erred in applying the doctrine here, since no governmental acts were involved.

As has been indicated *supra,* the petitioner alleged in his complaint (par. 6) that acts of duress by "Nazi officials and others" caused him to divest himself of his property (R. 12, 19). On a motion to vacate the warrant of attachment, before answer, and on the petitioner's bare pleadings, the District Court held that it would not inquire into any wrong done, because a foreign "act of state" was involved (R.53). This ruling was based entirely on the court's construction of the phrase "Nazi officials" in the complaint. The petitioner was thus peremptorily denied the opportunity to present evidence to prove that in fact the acts of duress alleged were not committed as governmental acts but for private purpose of personal gain, and by private parties.

The complaint should have been viewed in a light most favorable to the plaintiff. Rule 64 of the Federal Rules of Civil Procedure provides that an "* * * action in which any

of the foregoing remedies (attachment, etc.) is used * * *, if removed from a state court, shall be prosecuted after removal, pursuant to these rules". The settled law in the federal courts is that a complaint "should be viewed in a light most favorable to the plaintiff", and that "a complaint should not be dismissed unless it appears *to a certainty* that the plaintiff would not be entitled to relief under *any* set of facts which could be proved in support of the allegations set forth therein" (italics added). *Bowles* v. *Sunshine Packing Corporation*, 5 F. R. D. 282, 287 (W. D. Pa., 1946), and Rules and cases therein cited; *Gribble* v. *Ditto*, 119 F. (2d) 278, 280 (C. C. A. 2d, 1941); *Levenson* v. *B. & M. Furniture Co.*, 120 F. (2d) 1009 (C. C. A. 2d 1941); see *Barrett* v. *National Malleable & Steel Castings Co.*, 68 F. Supp. 410 (W. D. Pa., 1946), at 413, 418; see F. R. C. P. 8(f).

Certainly even the New York rule, if that should apply, would require liberality in the construction of the complaint. That rule, as stated by the court below, would require the Court to uphold the attachment unless the papers upon which it was based "*clearly indicate* that the plaintiff *must* ultimately fail" (R. 64; italics supplied). The court below itself admitted that plaintiff could reclaim his property if he had been deprived of it under certain circumstances (R. 66-67),—circumstances which are clearly susceptible of proof under the allegations of the complaint herein.

The plaintiff here having alleged that he was induced by the coercion of "Nazi officials and others" to tranfer his property should therefore, by any liberal construction of his pleadings, have been permitted to prove that the acts of coercion involved were private and not governmental acts. Certainly if the court below had followed the rule which it itself enunciated, the plaintiff should have been

permitted to prove that the transaction involving the transfer of his property, which is the gravamen of this cause of action, was a transfer by him to a private person and that no German governmental acts were involved. Ignoring the reference to "others", and similiar allegations that the plaintiff's German lawyers had, while visiting him in jail, urged him to give up the property as the price of his safety, the court below concluded that the only possible construction of the allegation was that an "act of state" was involved.

The record lends no support whatever for the view that the "Nazi officials" held public office, and even less for the assumption that they purported to exercise governmental authority (R. 24-26). The widely prevalent pattern of threats by private individuals and Nazi party people, under the Hitler regime, against members of persecuted minorities for purposes of private enrichment, is now well-known. The non-governmental role in which such persons in Germany openly acted for their private gain is now abundantly clear;* in fact, sufficiently so as to be matter for judicial notice.

The term "Nazi" is a colloquial abbreviation for a German political party. It is a term, strictly speaking, of political reference. *Webster's New International Dictionary, Second Edition* (1939) contains the following definition: "Nazi: A member of the National Socialist Party of

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* *4 Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression*, pp. 288, 302-305, 425, 443; *Official Transcript of the Proceedings of the International Military Tribunal*, mimeographed issue in English, May 6, 1946, p. 9037; see also *Institute of Jewish Affairs, American Jewish Congress, Hitler's Ten-Year War on the Jews* (1943), pp. 32-33, listing prominent examples of private enrichment by "aryanizations".

Germany; a Hitlerite.'"* It would be superfluous to labor the argument that "Nazi" clearly means and has always been taken to be a term of reference to the National Sozialistische Deutsche Arbeiterpartei. Precisely, that is all it now means or ever has meant, despite its no doubt widespread loose usage. Certainly the term came into common use long before the Nazis assumed control of the German government, and at a time when it could only have had reference to the Nazi party. See, *e.g.*, G. D. H. Cole and Margaret Cole, *A Guide to Modern Politics,* (1934) pp. 146 *et seq.* It is therefore fair to assume that in referring to "Nazi officials" the plaintiff meant officials in the Nazi party. If the plaintiff had intended to refer to officials of the German government he would have referred to them explicitly as "German government officials". Certainly, it cannot fairly be said that the term "Nazi officials" *conclusively* denoted government officials.

At the very least it may be argued that the phrase "Nazi officials" is latently ambiguous.** If so, it obviously

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* In an article written by Sidney B. Fay, Ph. D., L.H.D., Professor of History, Harvard University, for the *Encyclopaedia Britannica 1938 Book of the Year,* the word "Nazi" is defined as follows:

> "A popular and convenient but slightly derogatory abbreviation for members of the National Socialist Party led by Adolf Hitler since 1920. According to some writers it arose during the early days of the party as a derisive nickname from a local Bavarian slang expression meaning mountain country bumpkin or 'hill billy'. More probably it arose from the German pronunciation of the first two syllables (Nazi) of its long official name—National Sozialistische Deutsche Arbeiterpartei * * * just as the members of the Social Democratic party used to be known as Socis."

** The majority opinion below concedes the existence of a "dispute" as to the meaning of the phrase (R. 64).

is susceptible of construction as a term of political rather than governmental denotation. The courts below clearly erred in taking the construction that they did, for in so doing they construed the phrase against the plaintiff rather than liberally and in his favor. *Porter* v. *Karavas,* 157 F. 2d 984 (C. C. A. 10, 1946).

It should be noted at this point that the majority opinion of the court below apparently proceeded on the completely erroneous apprehension that the plaintiff had been afforded the opportunity to file an explanatory affidavit "in opposition" to the defendant's motion in the District Court (R. 62, 65). That is not the case. The attachment was vacated (and concurrently, and we contend erroneously, the complaint was dismissed) solely on the papers originally filed by the plaintiff.

The court below further erred in inferring a governmental "confiscation" of plaintiff's property to be alleged as the basis of his claim. The record contains no suggestion of governmental decree or order or of any administrative or judicial proceedings appropriating the plaintiff's property. On the contrary, it shows expressly that it was to *avoid* a threatened "confiscation", *inter alia,* that the plaintiff acted (R. 12).*

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* The prevailing opinion erroneously employs the word "confiscating" (R. 62) to paraphrase the plaintiff's allegation actually reading "dispossessing * * * by force, duress and coercion" (R. 20, at fol. 59),—a totally different concept in the circumstances here. One would be naive indeed to assume that a Nazi official's dispossessions "by force, duress and coercion" in Germany in 1937-1938 could not *conceivably* be acts undertaken unofficially and for purely personal motives.

The court below should have permitted the plaintiff to adduce evidence at a trial in respect to the character (*i.e.*, private or governmental) of the transactions complained of. Even the direct assertion that one is an agent of a government does not in and of itself necessitate the conclusion without proof that an act of his under inquiry is an "act of state". See *Horn* v. *Mitchell*, 223 Fed. 549, aff'd 232 Fed. 819, appeal dismissed 243 U. S. 247; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288; *The Bank of the U. S.* v. *Planters' Bank*, 9 Wheat. 904, 907; *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 565-67; *The Beaton Park*, 65 F. Supp. 211, 212-213; *Pilger* v. *U. S. Steel Corp.*, 98 N. J. Eq. 665, 130 Atl. 523; *Molina* v. *Comision Reguladora*, 92 N. J. L. 38, 104 Atl. 450; *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 32 F. (2d) 195; *United States* v. *Deutsches Kalisyndikat*, 31 F. (2d) 199.

As in *Land* v. *Dollar*, 67 S. Ct. 1009, 1011, this is clearly

> "the type of case where the question of jurisdiction is dependent upon decision of the merits".

Land v. *Dollar* appears controlling at the threshold in the instant case. It is in the tradition of a long line of leading cases in the federal courts and in England that prescribe ascertainment of the actually existent circumstances as the correct practice where, as here, the question of exercising jurisdiction turns on disputed facts. Cf. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; *McNutt* v. *General Motors*, 298 U. S. 178; *North Pacific Steamship Co.* v. *Soley*, 257 U. S. 216; *Gilbert* v. *David*, 235 U. S. 561; *Steigleder* v. *McQuestion*, 198 U. S. 141; *Wetmore* v. *Rymer*, 169 U. S. 115; *Roberts* v. *Lewis* 144 U. S. 653; *Princess Paley Olga* v. *Weisz*, (1929) 1 K. B. 718.

In the alternative, at the very least, the courts below should have permitted the plaintiff to amend his pleading so that there could be no dispute as to the private nature of the acts he alleged. Certainly, where there was a dispute as to the meaning of plaintiff's allegations, such dispute should not have been settled in this summary fashion without affording the petitioner an opportunity to present proof that there was no obstacle either to the court's jurisdiction or to its ability to proceed with the cause.

Still another reason why the lower courts should have set this case for trial is that *if* there be doubt as to the precise policy of the Executive toward Nazi Germany in this respect, such doubt should properly have been resolved by the taking of evidence: see Point "1-B", *supra*. The dissenting judge strenuously urged the importance of a trial to determine the issue of fact thus raised (R. 73, 74, 75).

In summarily dismissing the case on the plaintiff's pleadings, therefore, the court below denied the petitioner his right to a fair trial and to due process of law.

3. The District Court, on the record before it, lacked the power to dismiss the complaint.

The affirmance of the order of the District Court dismissing the complaint was error. The defendant's order to show cause (R. 5-6) was solely an application to vacate the warrant of attachment. The defendant's moving papers did not request a dismissal of the complaint or give notice that such a request would be made.

At the argument of the motion in the District Court the defendant's memorandum in support of the motion contained the following unsupported concluding statement:

"Point IV

"Plaintiff having failed to allege facts sufficient to state a cause of action, the warrant of attachment should be vacated, *and the complaint dismissed.*" (Italics supplied)

Under Rule 6(d) of the Federal Rules of Civil Procedure a motion to dismiss a complaint must be made on five days' notice. The petitioner was not served with five days' notice of such a motion. No shorter time having been fixed by court order and the petitioner not having waived the requirement of the rule, the motion to dismiss was not properly before the court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM S. BENNET
VICTOR HOUSE
Attorneys for Petitioner.

EARL G. HARRISON
SIDNEY M. DAVIS
of Counsel.

APPENDIX

Material Submitted to the Court Below Indicative of the Policy of the American Executive.

1. Establishment and proceedings of the International Military Tribunal (pursuant to agreement made August 8, 1945 and charter annexed thereto), reprinted in "Nazi Conspiracy and Aggression", U. S. Government Printing Office Publication, 1947.

2. Inter-Allied Declaration of January 5, 1943 (3 United Nations Review, 47; Department of State Publication 2630, European Series 15, p. 52).

3. Resolution No. VI at the Bretton Woods Conference (11 Department of State Bulletin No. 384, October 8, 1944).

4. Anglo-Soviet-American agreement made at Berlin (The Axis in Defeat, Department of State Publication 2423, pp. 10-18), par. 4.

5. Directive (JCS 1067) issued in April 1945 to Commander in Chief of the United States occupation forces in Germany (The Axis in Defeat, Department of State Publication 2423, pp. 40-59), pars. 44.d and 48.e (2) (3).

6. Military Government Law No. 52 (procurable from the War Department), Articles I, II and III.

7. Military Government Regulations (ditto), Title 17, pars. F, G.

8. American Organizational plans for Military Government of Germany (The Axis in Defeat, Department of State Publication 2423, pp. 60-62).

9. Allied agreement on requirements to be imposed on Germany, made in Berlin September 20, 1945 (The Axis in Defeat, Department of State Publication 2423, pp. 71-81), sec. VI, par. 19(a) and sec. XI, par. 42(b).

10. Treaty of peace with Hungary (Articles 24, 26 and 27), with Rumania (Articles 23, 24 and 25), with Bulgaria (Articles 22 and 23), and with Italy (Articles 75 and 78). (New York Times, January 18, 1947, pp. 25-36).

11. Military Government Law No. 1, entitled "Abrogation of Nazi Law" (Military Government Gazette, Germany, Issue No. 3, p. 1).

12. Control Council Law No. 1, entitled "Repealing of Nazi Laws", dated April 12, 1946 (procurable from War Department).

13. Article from New York Herald Tribune of March 12, 1947, concerning draft of first Restitution Law for Germany.

Directive, approved by the State, War and Navy Departments, to Gen. Lucius D. Clay, United States Commander in Germany, on the Military Government of that country (New York Times, July 16, 1947, p. 8):

"1. Purpose of This Directive

This directive, issued to you as commanding general of the United States forces of occupation and as Military Governor in Germany, constitutes a statement of the objectives of your Government in Germany and of the basic policies to which your

Government wishes you to give effect from the present time forward. It supersedes JCS 1067/6 and its amendments.

* * *

17. Restitution

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d. It is the policy of your Government that persons and organizations deprived of their property as a result of National Socialist persecution should either have their property returned or be compensated therefor and that persons who suffered personal damage or injury through National Socialist persecution should receive indemnification in German currency. With respect to heirless and unclaimed property subject to internal restitution you will designate appropriate successor organizations."